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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT, ILLINOIS CENTRAL RAILROAD COMPANY, IN OPPOSITION.

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July, 1954.

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OPINION BELOW.

The District Court did not write an opinion. Its findings of fact, conclusions of law and order appear in the record at pages 80-86. The opinion of the Court of Appeals (R. 109-124) is reported in 212 F. 2nd 22.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 19, 1954 (R. 124). The petition for a writ of certiorari was filed June 11, 1954. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code as amended.

QUESTIONS PRESENTED.

1. Whether Section 3 First (j) of the Railway Labor Act requires the National Railroad Adjustment Board to give notice of hearings to all "involved" employes.

2. Whether the incumbent of a position and his union are "involved" in a dispute before the Board between a railroad and another union claiming the same position.

STATUTE INVOLVED.

Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

STATEMENT.

On June 12, 1951, the Order of Railroad Telegraphers (hereinafter referred to as Telegraphers) instituted a proceeding against the Illinois Central Railroad Company (hereinafter called respondent) before the National Railroad Adjustment Board, Third Division (hereinafter called

the Board) (R. 45). That proceeding before the Board involves the right of the Telegraphers in and to a position at Palestine, Illinois, which position is presently filled by D. A. Shears, a member of the craft or class represented by the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks) (R. 45, 81).

After the Telegraphers' claim was filed with the Board, respondent was informed in writing by the General Chairman of the Clerks that in the event the employment rights of the present incumbent of the position in question were adversely affected by the claim filed by the Telegraphers, the Clerks would present and prosecute a claim against respondent based upon the same employment rights which are involved in the Telegraphers' proceeding (R. 48, 82).

There is no showing in the record that the incumbent of the position in question, D. A. Shears, has had notice, either actual or constructive, of the pending proceeding (R. 81).

On August 11, 1951, respondent filed its submission with the Board specifically setting forth, among other things, that the position involved was at that time occupied by a member of the Clerks and that the work in question was plain, ordinary clerical work of the type customarily performed by clerical forces on respondent's property and in the industry generally and that the claim was in reality one between the Telegraphers and the Clerks and should be dismissed unless the Board gave each organization an opportunity to present its side of the case (R. 45-56, 81).

The ten-member Board deadlocked on the merits of the Telegraphers' case. As a result the Mediation Board appointed a referee to resolve the deadlock on the merits pursuant to Section 3 First (l) of the Railway Labor Act (R. 44, 80-81).

On May 13, 1953, the proceeding before the Board came on for hearing. At that time the question of giving notice under Section 3 First (j) of the Railway Labor Act to D. A. Shears and the Brotherhood of Railway Clerks was considered by the Board for the first time (R. 46, 81-82) through an objection made by a carrier member of the Board. He objected to proceeding with the case until the required due notice was served on involved employees whom he defined as "the Brotherhood of Railway Clerks, or constituents thereof" (R. 24, 25-26, 46, 81-82). Said carrier member of the Board further called the Board's attention to the fact that respondent had been served with a notice of the Clerks' "intention to file and prosecute claim for the same work involved in this proceeding if the claim brought by the Telegraphers' organization is sustained" (R. 24).

Thereupon the Board went into an executive session to consider said objection. Pursuant to its custom the Board excluded all public members and the referee from the consideration of the due notice question (R. 26, 46, 82). At the hearing of the executive session the ten regular members of the Board voted on the objection to proceeding with the case in the absence of notice under Section 3 First (j). The result was a tie vote and therefore the objection failed to carry (R. 24, 25, 46, 82).

The public session of the Board was then reconvened. In accord with the usual practice of the Board the referee was not requested to vote on the due notice question, nor did he request an opportunity to do so although the vote on the question had resulted in a tie (R. 24, 46, 82). Thereafter, the same carrier member again objected to further proceeding until the Board had given notice pursuant to Section 3 First (j) of the Railway Labor Act. Notwithstanding said objection the hearing was resumed (R. 46, 82).

On May 22, 1953, respondent filed a verified Complaint in the District Court (R. 2) and thereafter moved for an order directing the Board to serve due notice upon D. A. Shears and upon the Brotherhood of Railway Clerks, or, in the alternative, enjoining further proceedings by the Board until such notice was served (R. 5).

In the verified Complaint respondent set forth that for several years the Board has denied and continues to deny the right of participation in proceedings before it to any persons not formally served with notice and that such practice violates the Railway Labor Act and the due process clause of the Fifth Amendment (R. 47).

The Telegraphers were permitted to intervene and file an Answer (R. 15-20). The Carrier Members of the Board also filed an Answer to the Complaint (R. 21-43).

In their Answer the five Carrier Members of the Board admitted:

(a) That Section 3 First (j) of the Railway Labor Act requires due notice be given to D. A. Shears and the Clerks (R. 21).

(b) That the First Division of the National Railroad Adjustment Board complies with the due notice provision of Section 3 First (j) of the Act (R. 21).

(c) That the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N. D. Ill. 1953), affirmed 212 F. 2nd 32, C. A. 7 (1954) on the ground that said Division's failure to give due notice deprived employees of their constitutional and statutory rights (R. 21-22, 28-30, 115).

(d) That the five Carrier Members are willing to serve the requisite due notice but that the five Labor Members are unwilling to do so (R. 22).

(e) That only persons receiving due notice pursuant to Section 3 First (j) of the Railway Labor Act are permitted to participate in proceedings before the Board (R. 23) and that persons having merely actual notice of proceedings before the Board are not permitted to participate therein (R. 42).

After considering the pleadings, exhibits and briefs (R. 85) the District Court entered findings of fact and conclusions of law in favor of respondent (R. 80-84) and issued a preliminary injunction which enjoined the Board from proceeding with the defendant Telegraphers' claim (a) until the Board gives formal notice to D. A. Shears and the Clerks and (b) permits said persons to participate in the proceedings before the Board (R. 85-86).

The Labor Members of the Board and the Telegraphers, petitioners herein, appealed from the order of the District Court (R. 89) but the Government did not appeal. The Court of Appeals affirmed the order of the District Court, Judge Swaim dissenting (R. 109-124).

ARGUMENT.

The issue in this case is si ngularly limited and no amount of strained statutory construction can convert it into one warranting review by this Court on certiorari. Petitioners cling to two basically erroneous misconceptions:

1. That Section 3 First (j) of the Railway Labor Act does not mean what it says; and
2. That the present incumbent of the position at issue before the Board and the union representing that individual are not "involved" persons in the proceeding pending before the Board.

Without these erroneous conclusions petitioners' case must fall.

To focus attention on precisely what is offered as an issue for this Court's determination, it should be pointed out that the District Court and the Court of Appeals have not interfered with the discretionary process of the Board, but on the contrary have merely insisted that the Board comply with a ministerial duty imposed by mandate of Congress in order that the Board's process be valid. Section 3 First (j) of the Railway Labor Act clearly imposes a duty upon the Board to serve notice of proceedings pending before it on "involved" persons.

Petitioners do not deny that both the Clerks and the Telegraphers claim the same position at Palestine, Illinois, nor is it denied that the Board proceeded to determine the Telegraphers' claim without first serving notice of such claim upon the present incumbent of the job or upon the Clerks; nor is it denied that there is no proof that the incumbent of the job had notice of the proceeding filed by the Telegraphers; nor is it denied that the Clerks and

the incumbent of the job could not have participated in the proceedings before the Board without formal notice.

On these facts, the decision of the court below was manifestly correct. As will be hereinafter pointed out, there is no conflict of decisions, and the decision below was required by the language of the Act and its legislative history.

The Decision Below Is Clearly Correct.

1. After a searching examination of the entire record and a thorough analysis of the law as announced in similar cases, the District Court and the Court of Appeals concluded that the Board was clearly required by Section 3 First (j) of the Railway Labor Act to give notice of the dispute filed by the Telegraphers to the incumbent of the job in question and to his union. The Courts below properly found that the plain and unambiguous language contained in the statute indicated Congress intended to safeguard the rights of all persons who might be affected by an award by requiring the Board to give notice as a prerequisite to obtaining jurisdiction. The legislative history of the Act and all Courts of Appeal that have passed on the question have so indicated. Hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. (1934) p. 51; *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2nd 793; *Estes* v. *Union Terminal*, C. A. 5 (1937), 89 F. 2nd 768; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railroad & Steamship Clerks*, C. A. 7 (1951), 188 F. 2nd 302; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2nd 527, certiorari denied 340 U. S. 842.

The statutory requirement that the Board "give due notice * * * to the employee or employees * * * involved in any disputes submitted to them" is one of the ministerial duties imposed upon the Board, which duty must be met before the Board obtains jurisdiction. The language employed in the Act prescribes and defines the duty with such precision and certainty that nothing is left to the exercise of the Board's discretion or judgment. In other words, the duty is so plainly prescribed as to be a positive command to the Board, which command must be obeyed before it can obtain jurisdiction over the merits of the case. *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2nd 793, 799.

2. As the Clerks and D. A. Shears are "involved" in the proceeding before the Board, notice must be served upon each of them. The Telegraphers' claim filed with the Board involves the employment rights to the position now filled by D. A. Shears (R. 81). In other words, the Telegraphers are claiming the right to the same work being done by Shears and would, if successful, supplant his right and that of the Clerks in and to the job at Palestine. Under these circumstances there can be no doubt that the present incumbent of the position at issue in the proceeding before the Board and his union are "involved" within the meaning of Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)]. The courts have uniformly held that under similar conditions those whose jobs and job rights are sought or affected by the claims of others are "involved" within the meaning of Section 3 First (j). *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2nd 793; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. 2nd 294, 300-301, certiorari denied, 342 U. S. 819; *Estes* v. *Union Terminal Co.*, C. A. 5 (1937), 89 F. 2nd 768, 770; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2nd 527, 534.

3. Petitioners contend that even if notice is required, actual knowledge of the proceedings is sufficient (Pet. 15). Petitioners, however, fail to inform the Court: (a) there is no showing that D. A. Shears, the incumbent of the position, has any knowledge of the proceeding before the Board (R. 81); and (b) only those receiving formal notice from the Board are permitted to participate in the proceedings before the Board (R. 42, 82).

It is well established that the incumbent of the position involved, as well as the union representing that individual, is entitled to notice (see *supra*, pp. 8-9); accordingly, petitioners' contention loses all force, in view of an absence of showing of actual notice on the part of Mr. Shears.

Where an administrative body, such as the Railroad Adjustment Board, acts judicially, notice and opportunity for hearing are indispensable for due process. The obvious purpose of the notice required by the Act is to assure to each employe who may be affected by a decision of the Board the guarantee of due process. However, since the Board will not permit participation by any other than those who have received formal notice of the proceedings (R. 42, 82), "actual notice" does not fulfill the purpose of the notice required by Sec. 3 First (j) of the Act.

This principle was recognized in *In Re Central Railroad Company of New Jersey*, C. A. 3 (1942), 136 F. 2d 633, 639, cert. den. 320 U. S. 805, where it was stated:

> "A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: Appear and you shall be heard; and, when he has appeared, saying: Your appearance shall not be recognized, and you shall not be heard."

To the same effect, in *Allain* v. *Tummon*, C. A. 7 (1954),

212 F. 2d 32, under a factual situation strikingly similar to the case at bar, the court said (p. 36):

> "Although we indicated in that opinion [*Hunter* v. *Atchison, T. & S. F. Railway Co.*, 188 F. 2d 294, 301] that actual notice of the hearing for a sufficient period prior thereto to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them nothing. Notice without the opportunity to be heard does not satisfy the requirements of due process."

4. The court below did not decide a controversy growing out of a duty performed under the Railway Labor Act, but only decided a controversy involving a refusal by the Board to discharge a substantive duty which the Railway Labor Act exacts. Consequently the cases cited by petitioners in support of the proposition that where a particular judicial remedy is specified for the review of administrative action, the specification of such remedy precludes any other (Pet. 12-13) are not applicable to the case at bar. Those cases concern actions by an administrative agency which involve the exercise of discretion or judgment. The case at bar involves the refusal of the Board to follow the positive mandate of Congress. In *Wilbur* v. *United States*, 281 U. S. 206, 218-219, this Court has previously recognized this differentiation between duties which are purely ministerial and those which involve the exercise of judgment and discretion stating:

> "Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> "The duties of executive officers, such as the Secre-

> tary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. *Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus*, unless there be provision or implication to the contrary." (Emphasis supplied.)

See also: *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *Order of Railway Conductors* v. *Swan*, 329 U. S. 520; *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U. S. 123; *United States, ex rel. De Lucia* v. *O'Donovan*, C. A. 7 (1950), 178 F. 2nd 876, certiorari denied 340 U. S. 866; *Chambers* v. *Robertson*, C. A. D. C. (1950), 183 F. 2nd 144, reversed on other grounds 341 U. S. 37; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Kansas City Southern Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178.

5. Petitioners suggest (Pet. 10-11) that the decision below transfers to the courts the resolution of questions vested in the Board for initial decision. This contention was properly considered by the Court of Appeals as pure sophistry; it stated (R. 117):

> "This argument, if it can be thus dignified, begs the whole question. It is based on the false assumption that the Board possesses the power to make an award without giving 'due notice' and an opportunity to involved parties to be heard. Obviously the court has not and will not advise the Board as to the kind of decision it should make. On that score we at present have no concern. The point is that the Board, under the situation existing, is without power to make any decision, right or wrong. And it must be remembered that the order under review does nothing more than

restrain the Board from proceeding until it has complied with the statutory command."

This case does not involve a departure from the rule that where Congress has specified a particular administrative or judicial procedure, such procedure is exclusive. On the contrary, respondent merely requested and the Court below only required the Board to follow the mandate of Congress in order that the Board might retain jurisdiction and issue a valid and binding award that would give respondent the protection to which it is entitled. This case involves the wilful refusal of the Third Division of the Board to comply with the positive command of Congress as expressed in Section 3 First (j) of the Railway Labor Act. Certainly Congress must have intended that there be some remedy if the Board failed to observe that command. However, if the federal courts cannot require compliance by the Board under their general jurisdictional powers, there would be no remedy available. This Court has previously passed upon a like question in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, where it was said, page 300:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act."

See also: *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 524; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of*

Railway & Steamship Clerks, C. A. 7 (1951), 188 F. 2nd 302, 305; *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. 2nd 481, 483-484, certiorari denied 300 U. S. 673.

6. Petitioners further suggest that the statutory defense to an enforcement suit affords respondent ample protection. In recognizing the fallacy of this contention, the court below stated (R. 118-119):

> "The Carrier has been involuntarily brought into the proceeding by action of the Board. In order to protect its rights and property, it must resist the Telegraphers' claim by participating in the proceeding. To do so it must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the Carrier is threatened not only with an abortive proceeding before the Board but by the Clerks in an action concerning the same employment rights. The reasoning in *Kirby et al.* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 799, is pertinent, wherein the court stated: 'Until the statutory requirements are met, it [the Board] has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies.'"

Although the foregoing is a complete answer to Petitioners' contention, it does not take into consideration the further fact that it is not uncommon for labor organizations to forego "judicial enforcement" of an award, whereby a carrier may obtain court review, in favor of "economic enforcement," whereby the carrier has no opportunity for court review. Economic enforcement exercised in the form of strikes and strike threats often leaves the carrier with

no choice other than to comply with an award which it knows to be invalid if it is to avoid labor unrest.

Respondent has already been advised in writing by the Clerks that said organization considers the position in question as one properly within its scope and that it will prosecute before the Board a claim for the position in the event respondent is unsuccessful in defending the pending claim of the Telegraphers (R. 48). This fact was made known to the Board (R. 24) but in spite of such knowledge it persists in its refusal to serve the required notice. In the Clerks' case the Board would likewise refuse to serve notice upon the Telegraphers (R. 47, 82 and 83). Both of these controversial matters, however, can and should be determined by the mere expedient of the Board giving formal notice as required by statute and permitting involved persons to participate in the proceedings. *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, C. A. 7 (1951), 188 F. 2nd 302. The Board can then determine which contract applies or whether both apply.

In addition, the claim of the Telegraphers which is pending before the Board seeks, among other things, back wages. A final award on the present record would be void due to the failure of the Board to comply with Section 3 First (j) of the Railway Labor Act (*Kirby* v. *Pennsylvania R. Co.*, C. A. 7 (1950), 188 F. 2nd 793, 799) but if there is merit in the Telegraphers' claim, the wilful failure of the Board to follow the jurisdictional mandate of the statute will delay ultimate decision and the period during which double payments for one position would be claimed. This period undoubtedly would be further prolonged by wilful failures on the part of the Board to comply with the notice provision in subsequent proceedings, for, if the Board

cannot be compelled to comply with the jurisdictional requirement in this instance, it could not be required to comply with jurisdictional requirements in subsequent proceedings.

There Is No Conflict of Decisions.

The requirement of due notice contained in Section 3 First (j) of the Railway Labor Act is but a reiteration of one of the oldest basic principles in our form of government, *i.e.* the assurance of due process of law to each person who may be affected by a decision of a court or of an administrative body acting judicially. Courts of Appeals in all parts of the country have had no difficulty in so interpreting that Section. *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2nd 793; *Estes* v. *Union Terminal*, C. A. 5 (1937), 89 F. 2nd 768; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, C. A. 7 (1951), 188 F. 2nd 302[1]; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2nd 527, certiorari denied 340 U. S. 832. Petitioners' suggestion that the decision below is in conflict with the holdings in other circuits is without foundation in fact. In support of this contention petitioners cite *Order of Railroad Telegraphers* v. *N. O. T. & M. R. Co.*, C. A. 8 (1946), 156 F. 2nd 1, certiorari denied 329 U. S. 758. That case, however, was decided in 1946 and is no longer the latest authoritative expression of the Court of Appeals for the Eighth Circuit. In *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2nd 527, certiorari denied 340 U. S. 832, the Court of Appeals for the Eighth Circuit again had occasion to pass upon the question of the notice required in proceedings

1. For other cases from this Circuit see: *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. 2nd 32; *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, C. A. 7 (1948), 171 F. 2nd 594, certiorari denied 337 U. S. 916; *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. 2nd 481, certiorari denied 300 U. S. 673.

before the National Railroad Adjustment Board. This latter case overruled the *N. O. T. & M.* case and held that certain awards of the Board were illegal and void because involved employes were not given notice of the proceeding before the Board nor afforded an opportunity to be heard in such proceedings. Accordingly, there is no conflict of decisions among the circuits.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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